

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 75-1035

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To be argued by  
DAVID V. KEEGAN

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## United States Court of Appeals

For the Second Circuit

Docket No. 75-1035

UNITED STATES OF AMERICA,

*Appellee,*

—v—

FRANK ELIANO,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

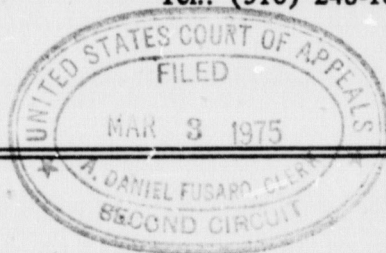
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### BRIEF FOR THE APPELLANT

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FRANK ELIANO,

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## BRIEF FOR THE APPELLANT

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### Preliminary Statement

Frank Eliano appeals from a judgment of conviction entered on January 10, 1975 in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Harold R. Tyler, United States District Judge and a jury.

Indictment 74 Cr. 267 filed on March 18, 1974 contained four counts. Counts One, Two and Three, charged the defendant with willful evasion of income taxes in 1968, 1969 and 1970 respectively, in violation of Title 26 United States Code, Section 7201. Count Four charged the defendant with failure to file an income tax return in 1970, in violation of Title 26 United States Code, Section 7203.

The trial commenced on December 2, 1974 and on December 5, 1974 the jury returned a verdict of guilty on all four counts.

On January 10, 1975 Judge Tyler sentenced the defendant to three years imprisonment on each of Counts One, Two and Three, said sentences to be concurrent, and to six months imprisonment on Count Four, said sentence to be consecutive to the three year sentences.

The defendant is serving his sentence having been remanded in lieu of bail.

### **Statement of Facts**

#### **A. The Government's Case**

The Government called an Internal Revenue Service employee, Eileen Slattery, to introduce certificates of assessments and payments pertaining to the defendant for the tax years 1968, (G.X. 1\*), 1969 (G.X. 2) and 1970 (G.X. 3). Government Exhibit 1 reflected that a tax return for 1968 was filed on behalf of the defendant showing taxes due in the amount of \$638.92 which amount accompanied the return. Government Exhibit 2 reflected the filing of a tax return for 1969 on behalf of the defendant, showing taxes due in the amount of \$1,564.13\*\*. Government Exhibit 3 showed that the defendant obtained two extensions of time to file his 1970 return but no return was filed for that year. (Tr.\*\*\* 20-39).

The Government's proof of unreported income to the defendant consisted of the testimony of two prostitutes. One, Sandra Marchand, claimed that from January or

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\* "G.X." refers to Government's Exhibits in evidence.

\*\* Apparently the taxes were paid late and a delinquency penalty was assessed.

\*\*\* "Tr." refers to the Trial transcript.

February, 1968 until October, 1970 she earned between \$200 and \$300 per night, seven nights a week except for seven or eight nights she spent in jail. (Tr. 281-301). The second prostitute, Frances Bak, claimed that she engaged in prostitution from December, 1968 until July 1969 and she was told by the defendant that she earned between \$20,000 and \$25,000 during that period. (Tr. 215-227). Both prostitutes claimed that they turned over all the money they made to the defendant (Tr. 296-302; 225-26) and both claimed they were introduced to prostitution by the defendant (Tr. 216-19; 283-89) and only continued it because they feared the defendant (Tr. 258, 324).

The Government also introduced a series of documents from the South Brooklyn Savings Bank (G.X. 90, 91, 91A, 92, 93, 94, 96, 97, 98 and 102) (Tr. 90-149) all designed to prejudice the jury by showing that the defendant had a savings certificate in an amount exceeding \$12,000\* (G.X. 91A) and made two deposits exceeding \$2,000 each in 1970 (G.X. 97\*\* and 98). The only document which could be said to have any relevance on the income tax issue is G.X. 91A, the passbook for the savings certificate which shows that \$536.09 interest was posted to the account on February 23, 1971, all of which was earned in 1970. (Tr. 115). The Government also proved that the defendant had a bank account in Bankers Trust Company (G.X. 10, 11, 15) which was in trust for Sandra Marchand (G.X. 10) (Tr. 392-401).

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\* Sandra Marchand who lived with the defendant for 2½ to 3½ years and claimed she did so because of his threats appears as the beneficiary on the savings certificate. (G.X. 90) (Tr. 152).

\*\* Interestingly, G.X. 97 shows that a check in the amount of \$1,772 was part of this deposit, and G.X. 98 reflects a deposit of \$2,345.39 in one check. It is unusual for prostitutes to receive payments in the form of checks, particularly checks of such large amounts.

The Government also introduced through Donald Nelson, a "customer statement" signed by the defendant on January 23, 1969 for the purchase of a Cadillac in which the defendant claimed to have been employed by Tony & John's Beauty Salon in Brooklyn for the past two years. (G.X. 6) (Tr. 57-65). The Government then produced the owner of Tony & John's Beauty Salon, one Gabriel Borgo, a cousin of the defendant who testified that the defendant did not work for him at Tony & John's (Tr. 80 and 88), but that the defendant had been engaged in business with him at the Debutante Beauty Salon in 1966, 1967 and 1968. (Tr. 79a\*).

The Government then called an expert who testified, based on the prostitutes' testimony, that if the defendant had understated his income in 1968 by some \$30,000 as claimed, then his tax liability for 1968 was understated by almost \$13,000. The expert also testified that if in 1969 the defendant understated his income by \$92,000 as claimed, then his tax liability for 1969 was understated by some \$53,000. Similarly, the expert computed a tax liability of some \$22,000 for 1970, based on unreported income of \$58,000 (Tr. 430-453).

The Government also proved that the defendant falsely claimed to be employed by P & R Meat Corporation at a salary of \$500 per week, on an application for an apartment in a "luxury building with all the amenities". (G.X. 8) (Tr. 271-278).

Finally, the Government introduced in evidence a 25 count indictment filed by a New York County Grand Jury in 1971 charging the defendant with promoting prostitution, coercion, reckless endangerment, assault, possession of a weapon, sodomy, sexual abuse and sexual misconduct

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\* Tr. p. 79 was originally misnumbered p. 61.

(G.X. 17) (Tr. 423). The Government also called a court reporter who read her notes showing that on May 31, 1972 the defendant admitted his guilt and pled guilty to Count Two to satisfy the entire indictment (Tr. 486-87). Count Two charged the defendant with advancing prostitution on or about February 15, 1969 by compelling Sandra Marchand by force and intimidation to engage in prostitution.

#### **B. The Defendant's Case**

The defendant's sister Terri Liberi testified that Marchand and the defendant were lovers and Sandra had been a frequent visitor to the Liberi home. In fact, the two even spent weekends at the Liberi home on occasion. In addition Sandra Marchand's mother and son had met the defendant's family and Marchand had attended family dinners (Tr. 503-513). The defendant's mother confirmed his sister's testimony regarding the relationship between Marchand and the defendant, and added the fact that she gave her son some \$15,000 in 1968, \$13,000 in 1969 and \$20,500 in 1970. The 1969 and 1970 gifts were supported by bankbook entries from a Port Washington Bank (D.X. S)\*. In 1968 the family had lived in Brooklyn and the bankbook to support those gifts was no longer available. (Tr. 514-27).

In addition, the defendant proved that he sold his hair styling business in October 1966 for over \$41,000 (D.X. A) (Tr. 200).

### **ARGUMENT**

#### **POINT I**

**The judgment of conviction must be reversed because the Court erroneously permitted the Government to prove a prior conviction despite the fact that the defendant did not testify.**

At the very outset of the trial, the prosecutor informed the Court that he intended to prove on his case-in-chief the

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\* "D.X." refers to Defense Exhibits in evidence.

defendant's 1972 New York State conviction for promoting prostitution in the second degree. The defendant objected most strenuously (Tr. 5). Again, when the prosecutor made its offer of proof,\* the defendant objected, since he was not going to take the stand. (Tr. 380-383). The Court was obviously troubled by the offer and asked the prosecutor for authorities supporting the admissibility of the proffered testimony (Tr. 388-390). The prosecutor stated that the rule of admissibility is "whether or not the prejudicial value of the information . . . outweighs the probative value," (Tr. 389) which is the rule for prior similar acts, see *United States v. Deaton*, 381 F. 2d 114 (2d Cir. 1967) and *United States v. Byrd*, 352 F. 2d 570 (2d Cir. 1965) and has nothing to do with prior convictions.

The prosecutor then misrepresented to the Court that a prior conviction for keeping a brothel was admitted in evidence in a tax case in *United States v. Williams*, 355 F. 2d 516 (4th Cir. 1966) (Tr. 413). In fact, in *Williams*, only *testimony tending* to show that the defendant was the proprietress of a brothel was admitted, not a prior conviction, and this rule the prosecutor had already exploited to the utmost by having two prostitutes testify to their dealings with Eliano. All but one of the additional cases cited by the prosecutor were similarly inapplicable to the situation facing the Court\*\* (Tr. 413-417). The only case supporting the introduction of arrests and convictions is *United States v. Guidarelli*, 318 F. 2d 523 (2d Cir.), *cert.*

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\* The "Strike Force" prosecutor incorrectly stated that the plea to Count Two of a 25 count indictment (G.X. 17) was an admission by the defendant that he had coerced and promoted prostitution of Sandra Marchand and Frances Bak from 1967 through 1970. In fact, Count Two related only to Sandra Marchand and only to one day, February 15, 1969. (G.X. 17) (Tr. 380-383).

\*\* The prosecutor cited: *United States v. Knohl*, 379 F. 2d 427 (2d Cir.); *cert. denied* 389 U.S. 973 (1967); *United States v. Light*, 394 F. 2d 908 (2d Cir. 1968); *United States v. Bozza*, 365 F. 2d 206 (2d Cir. 1966).

denied 375 U.S. 828 (1963), which was a "net worth" tax case in which the Government was permitted to prove the defendant's arrests and convictions for bookmaking. While the decision makes no mention of the issues here raised, it appears that the defendant did not take the stand, but it also seems the Government had no proof of the defendant's source of income except the prior convictions. In *Eliano*, the Government did not employ a net worth approach, but rather had two prostitutes testify that they turned over their earnings to the defendant. It hardly seems necessary or relevant following such testimony to prove that the defendant had pleaded guilty to coercing Marchand to engage in prostitution on one day in 1969. In fact the only reason such testimony was offered was to prejudice the defendant and the admission of the prior conviction requires reversal. See *Marshall v. United States*, 360 U.S. 310 (1959)\*; *Brown v. United States*, 83 F. 2d 383 (3rd Cir. 1936); *Mercer v. United States*, 14 F. 2d 281 (3rd Cir. 1926).

The proof that the jury was prejudiced by the evidence of *Eliano's* prior conviction lies in their note to the Court in which they stated:

"May we have the exact wording of indictment to which *Eliano* pleaded guilty, New York Supreme Court. Thereafter the decision may be reached almost at once." (Ct.X. 3) \*\*

The note was received at 6:00 p.m. (Tr. 587), and despite the amount of time taken in retrieving the state indictment which was in the jury room, and giving the jury a

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\* The conviction in *Marshall* was reversed even though the jury's knowledge of the defendant's prior convictions came from newspapers published during the trial and not from the prosecutor.

\*\* "Ct.X." refers to Court's Exhibits.

corrective instruction on an unrelated issue, the jury reported their verdict at 6:20 p.m. (Tr. 599). Based on that note, there can be no argument of harmless error. It is apparent that the prior conviction played a significant, if not decisive role in the jury's verdict and this error requires a reversal.

## POINT II

**The Court erred in permitting the entire 25 Count State indictment to be seen by the jury.**

The prosecutor offered the entire 25 Count indictment into evidence, and the Court, over objection, received the exhibit only as to Count Two (G.X. 17) (Tr. 424). Thereafter a court stenographer read into evidence Eliano's guilty plea to Count Two of the indictment including the usual State court phrase ". . . the pleas is to cover—to satisfy the entire indictment," (Tr. 485-486). This phrase further indicated to the jury that Eliano was guilty of the remaining twenty-four charges including sodomy, sexual misconduct, coercion, possession of a weapon, reckless endangerment, sexual abuse and assault. (G.X. 17). The prosecutor failed to excise all but Count Two of the State court indictment, and the Marshal delivered the entire indictment to the jury\* (Tr. 595). Since an indictment contains only charges and is not evidence of the accused's guilt, a mere indictment is not admissible in evidence

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\* The prosecutor apparently was aware that the jury had the State court indictment because when the jury asked for the exact wording of it, he informed the Court "It was submitted, your Honor to the jury" (Tr. 588), and he added "They have that, your Honor, I think it is 17 or 18, I forget. It is there" (Tr. 589). The defense attorney was not aware of that fact and had to ask "Your Honor, was the entire exhibit received?" (Tr. 590) and later ". . . I just wanted to know physically, your Honor, whether the entire thing was presented?" (Tr. 591).

against even a witness, much less a non-testifying defendant. See *Coyne v. United States*, 246 F. 120 (5th Cir. 1917) ; *Glover v. United States*, 147 F. 426 (8th Cir. 1906). In Eliano's case the indictment (the remaining 24 counts) was no longer even pending having been dismissed on his plea to Count Two.

The Court's only attempt at a curative instruction was the statement "... Court Two is the only count or portion that is relevant. ..." (Tr. 591). The Court made no attempt to discover whether the jury or any of them had read the State indictment and refused to declare a mistrial (Tr. 595).

The prejudice that flows from presenting a jury with such evidence leaves the Court no choice but to reverse Eliano's conviction.

### POINT III

**The judgment must be reversed and the indictment dismissed because the prosecutor who presented the evidence to the Grand Jury was not authorized to appear in the Grand Jury.**

The evidence upon which the indictment in this case was based was presented to the Grand Jury by Charles E. Padgett. Mr. Padgett was at the time a special attorney appointed by Henry E. Petersen, an Assistant Attorney General. The appointment was made pursuant to Title 28 U.S.C. Section 515 which provides as follows:

"(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and

proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought."

"(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000."

The letter\* appointing Mr. Padgett reads as follows:

Department of Justice  
Washington 20530  
June 1, 1973

Mr. Charles E. Padgett  
Criminal Division  
Department of Justice  
Washington, D. C.

Dear Mr. Padgett:

The Department is informed that there have occurred and are occurring in the Southern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the

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\* See page 3 of Judge Werker's decision in *United States v. Crispino*, 74 Cr. (HFW) (S.D.N.Y.) (Feb. 14, 1975).

Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,

/s/ HENRY E. PETERSEN  
Assistant Attorney General

As pointed out by Judge Henry Werker of the Federal Court for the Southern District of New York, in an opinion which reviews the legislative history of Title 28 U.S.C. Section 515 and the cases decided under that section, in *United States v. Crispino* Indictment No. 74 Cr. 932 (HFW) Slip Op. (Feb. 14, 1975):

"... the one element that is common to every case which has either upheld or dismissed challenges to the authority of special attorneys to appear before

grand juries is that the commission letter at least described particularly the *type* of cases . . . that the special attorneys were to present to grand juries. That element is conspicuously missing in this case.”\*

“The commission letter issued to Mr. Padgett is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supersede the local United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any cases involving a violation of a “federal criminal statute.” Congress never intended to give such a broad authority when it passed the Act of 1906 even if the statute be for the “protection of the United States,” and no case construing that statute supports such a proposition.” (See *Crispino* pp. 20-22).

The Court added that “He (the Attorney General) had no authority to issue a broad roving commission such as the one given to Mr. Padgett with its complete lack of any *specific direction*.” Therefore, Padgett had no authority to appear before the Grand Jury pursuant to Rule 6(d) of the Federal Rules of Criminal Procedure and therefore the conviction must be reversed and the indictment dismissed.

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\* Judge Werker was considering the “commission letter” of Charles E. Padgett, the very same “special attorney” who obtained the indictment in both *Crispino* and *Eliano*.

### CONCLUSION

The judgment of conviction must be set aside because the Court permitted the prosecutor to prove a prior conviction of the defendant who did not testify, because the Court permitted the jury to see an entire 25 count indictment against the defendant which was not in evidence, and because the prosecutor who appeared before the Grand Jury was not authorized to do so; and, for the last reason stated, the indictment must be dismissed as well.

Respectfully submitted,

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